88-482

No. 86-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1988

ROBERT E. HOWELL, BETTY CHAVEZ AND ERNEST SCHUMACHER, AS ADMINISTRATOR OF THE ESTATE OF RODNEY L. HOWELL,

DR. AND MRS. J. CRAYTON PRUITT, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF MARK H. PRUITT,

CORINA K. YIN, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF PAUL C. YIN,

CHARLES BOLAND, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF ANN RENEE BOLAND AND CYNTHIA BOLAND,

Petitioners,

v.

UNITED STATES FIRE INSURANCE COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE GEORGIA COURT OF APPEALS

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QUESTIONS PRESENTED FOR REVIEW

I. Whether 14 C.F.R. 298 et seq applies to a local flight, where the flight is conducted by an air carrier registered under Part 298, supra, and where it otherwise constitutes air transportation affecting interstate commerce.

II. Whether an air taxi operator (charter operator) registered under Part 298, supra, is required to carry insurance where, within the scope of the carrier's operation for which it is registered, it conducts a local flight that affects interstate commerce.

III. Is the fact that a particular flight begins and ends within the confines of a single state always determinative of whether the flight affects interstate commerce? The Georgia Court of Appeals applied a strict geographical test in determining that such a flight would always constitute an intrastate operation.

THE PARTIES

ROBERT E. HOWELL, BETTY CHAVEZ and ERNEST SCHUMACHER, as Administrator of the Estate of Rodney L. Howell,

DR. and MRS. J. CRAYTON PRUITT, Individually and as Administrator of the Estate of Mark H. Pruitt,

CORINA K. YIN, Individually and as Administratrix of the Estate of Paul C. Yin,

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14 C.F.R. §298.41(a)	3, 4, 5, 8, 9

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PETITION FOR WRIT OF CERTIORARI TO THE GEORGIA COURT OF APPEALS

Petitioners respectfully request that a Writ of Certiorari issue to review the decision of the Georgia Court of Appeals in this case.

Official Report

The opinion of the Georgia Court of Appeals is reported at *Howell, et al v. United States Fire Insurance Company*, 185 Ga. App. 154, 363 S.E.2d 560 (1987).

Jurisdictional Grounds

The Supreme Court of the United States has jurisdiction pursuant to 28 U.S.C. §1257.

Moreover a State Court has decided an important question of Federal law which has not been but should be, settled by this Court, and in addition, has decided a Federal question in a way that conflicts with applicable decisions within the same state. Sup. Ct. R. 17.

The original denial of a Motion for Rehearing was dated June 22, 1988. This Petition for Certiorari is being filed within ninety days from the denial for Motion for Rehearing.

The history of this case shows that the Georgia Court of Appeals rendered its consolidated decision in *Howell v. United States Fire Insurance Company*, on November 5, 1987. The Georgia Supreme Court granted certiorari on January 21, 1988. Inexplicably, the Georgia Supreme Court then withdrew its Writ of Certiorari on May 4, 1988. A Motion for Rehearing upon the Georgia Supreme Court's decision to withdraw its previous grant of certiorari, was denied, after oral argument, on June 22, 1988.

Regulations

14 C.F.R. §298.1
14 C.F.R. §298.2(b)(c)
14 C.F.R. §298.3(a)
14 C.F.R. §298.21(a)
14 C.F.R. §298.37
14 C.F.R. §298.41(a)
See Appendix (F)

Statement of the Case

This appeal arises out of the crash on September 29, 1985 of an aircraft federally registered as N551CC near Jenkinsburg, Georgia. It raises the question of whether an interstate air taxi operator's insurance carrier can escape liability where the fatal crash occurs during a local flight which does not cross state lines but which is otherwise within the scope of the carrier's registered operation and which affects interstate commerce.

In this case seventeen people died when the aircraft apparently stalled and fell from flight shortly after take-off. The purpose of the flight was to transport, for compensation or hire, sport parachutists.

The aircraft was titled in the name of Air Carriers Express Services, Inc., and was registered as an air taxi operator under Part 298 of the Economic Regulations [14 C.F.R. §298 *et seq*] and also was certificated under Part 135 of the Federal Aviation Regulations. All air tax operators engaged in air transportation (interstate commerce) are required by 14 C.F.R. §298.3 and §298.21 to register with the Civil Aeronautics Board (now Department of Transportation). This carrier's registration as an air taxi operator was in full force and effect on the date of the crash.

Moreover, registered air taxi operators are required by 14 C.F.R. §§298.37 and 298.41 to maintain aircraft accident liability insurance. Air Carriers Express Services, Inc. and its insurer filed C.A.B. Form 257 certifying insurance in compliance with applicable regulations.

Although Air Carriers Express Services, Inc. was registered as an interstate air taxi operator under Part 298 and was operating within the scope of its registration at the time of the fatal flight, the Georgia Court of Appeals nevertheless permitted the operator's accident insurance carrier to escape liability to fare paying passengers upon a finding that Part 298 was inapplicable to intrastate (local) flights. The overall operation of Air Carriers Express Services, Inc., however, was factually interstate in

nature, as evidenced by the fact it registered under these regulations.

Federal Question

The federal question presented was first raised in the Cross-motions for Summary Judgment and briefed by both parties in the court below and at all stages in the proceedings. [R-338, 639] The federal question presented in this appeal was the determinative issue in the decision below.

Reasons for Granting the Writ

This case involves the important question of whether Part 298 of the Economic Regulations is applicable to local flights by an interstate operator registered under these regulations and which otherwise constitutes air transportation affecting interstate commerce. (See 14 C.F.R. §298.2(b) & (c)).

This question is vitally important not only to the litigants in this case, but also to all citizens because the answer determines whether insurance will be available to air crash victims as provided in the Economic Regulations. If insurance is not mandated by 14 C.F.R. §§298.37 and 298.41, then no required insurance will cover fare paying passengers traveling between points within a state, even though the air taxi operator is registered as engaged in air transportation under 14 C.F.R. §298 *et seq.* There is no state law which requires any such insurance in the State of Georgia.

The Georgia courts are evenly split on this issue. In *Corin v. Puritan Insurance Company*, 184 Ga. App. 667, 362 S.E.2d 380 (1987), the Georgia Court of Appeals correctly noted that insurance was required for a registered operator for an intrastate flight where the overall operation is or even may include authority for interstate flights. A local joy ride was at issue in *Corin.*

In the case below, however, a different panel of the Georgia Court of Appeals held that the fact the actual accident flight was local was determinative of the question of whether the flight was

intrastate, and consequently, was determinative of the question of coverage and the applicability of 14 C.F.R. §298 *et seq. Howell, et al v. United States Fire Insurance Company*, 185 Ga. App. 154, 363, S.E.2d 560 (1987).

The court below erred when it apparently attached no consequence to the following undisputed, material facts: (1) the air taxi operator was registered as interstate air taxi operator under Part 298 of the Economic Regulations; (2) the air taxi operator's insurance carrier had filed a certificate of insurance as mandated by the Economic Regulations; (3) the fatal flight was within the scope of the carrier's operation for which it was registered; (4) the parachuting operation was in fact interstate in nature in that the operator routinely flew from state to state for this purpose, advertised the flights in national and international publications; and (5) because at least one of the parachutists killed had flown in from out-of-state to jump from this particular airplane.

In disregarding the above-stated facts, the Georgia Court of Appeals utilized a strict geographical test to determine whether the flight was intrastate or interstate for purposes of the applicability of the Economic Regulations. Thus, under this opinion the question of required insurance coverage depends solely on the question of whether the flight crossed state lines. No analysis of the impact of the scope of the interstate commerce clause of the Constitution of the United States was considered by the Georgia Court of Appeals.

The practical effect of this ruling can be gleaned by the following example: A registered charter operator transports passengers for compensation or hire from Columbia, South Carolina to Atlanta, Georgia. Under the ruling below by the Georgia Court of Appeals, insurance coverage would be afforded under 14 C.F.R. §298.41. Should the same charter operator then pick up a load of passengers and transport them from Atlanta, Georgia to Albany, Georgia, however, the Georgia Court of Appeals would find no mandatory coverage for the flight.

The ruling ignores the authority granted the Civil Aeronautics Board (now Department of Transportation) under the Interstate Commerce Clause and applicable statutes and regulations. For example, that authority was properly asserted in *Braniff Airways*, 40 C.A.B. 887 (1964) where the Board rejected an interstate carrier's attempt to circumvent its jurisdiction where proposed intrastate flights were at issue. In *Braniff*, the carrier had filed an application for a Declaratory Order seeking to disclaim the Board's jurisdiction over a proposal to carry passengers wholly intrastate for free. Braniff argued that neither interstate air commerce nor interstate air transportation was affected and the Board was therefore without any regulatory jurisdiction. The C.A.B. flatly rejected this position and held:

> The Board has concluded that the proposed service constitutes air transportation within the meaning of the Act, and accordingly it will deny the application for disclaimer of jurisdiction. The factors which determine whether Braniff's proposed operation is intrastate or interstate transportation are the essential nature of the movement and the character of the traffic. . . .
>
> Admittedly Braniff is a common carrier in the services it operates over its certificated routes, including points within the State of Texas, and also holds itself out to perform common carriage service between all points for the transportation of persons and property on a charter basis. . . .
>
> On the basis of the matters set forth in the application, particularly the geographical area of the proposed operations and the alleged benefits which will accrue to Braniff's common carriage operations, it is concluded that the proposed tour is within the scope of Braniff's holding out as a common carrier and constitutes common carriage.

Braniff Airways, 40 C.A.B. 887, 888 (1964).

In the case *sub judice*, Air Carriers Express Services, Inc. was not only a registered operator, but its registered geographical

limits also included the entire United States, Canada, Republic of Mexico and the Bahama Islands. Moreover, the nature of the operation at the time of the crash was within the scope of the carrier's operation, *i.e.*, flights advertised and conducted throughout the United States involving parachuting.

Further support for Petitioners' Petition is found in *Administrator v. Ferguson*, N.T.S.B. Order No. EA-1822 (1982). At issue were charges against a pilot for air taxi flights in air commerce with passengers for compensation or hire to and from Tyrell, Texas without a Part 135 certificate. The N.T.S.B. easily decided the question of whether the flight constituted interstate or intrastate commerce, noting:

> Respondent first argues that these flights were not 'air commerce' which is defined in the Federal Act as interstate, overseas or foreign air commerce or the transportation of mail by aircraft or any operation or navigation of aircraft which directly affects or may endanger safety in, interstate, overseas or foreign air commerce. The intrastate nature of those flights however, does not mean that the safety regulations promulgated and enforced by the FAA are not applicable. It is well settled that the FAA's authorities have been broadly construed to extend to such flights because of their safety impact on interstate commerce.

N.T.S.B. Order No. EA-1822

The Respondent has relied heavily upon the case of *Dower v. United Airlines*, 329 F.2d 684 (9th Cir. 1964), for the proposition that purely intrastate flights are exempt from the Economic Regulations. A close reading of that case, however, reveals that the complaint in *Dower* failed to allege that the flight was interstate. The court noted that there was nothing in the record to demonstrate that the flight was "interstate." Hence the court simply directed the plaintiff to amend the petition to allege that the flight was interstate. When the plaintiff, for some unknown reason, refused to amend, the court dismissed the petition. Factually and procedurally, *Dower* is inapposite to the case at bar. Moreover,

Dower pre-dates enactment of the liability insurance requirement under Part 298 of the Economic Regulations which relates to charter operators. Also, it does not appear that *Dower* would be followed today.

Conclusion

The Georgia Court of Appeals erred in refusing to acknowledge that a local flight can be "interstate" for purposes of the interstate commerce clause and the applicability of 14 C.F.R. §298 *et seq*. The test employed by the Georgia Court of Appeals was strictly geographical, i.e., was the flight to begin and end within the confines of the State of Georgia? The fact that the flight was conducted by a registered air carrier and affected interstate commerce was not a consideration.

This is not a case where the Petitioners are burdened with having to contend with whether the operator should have registered with the C.A.B. in order to conduct the accident flight. This is a case where Air Carrier Express Services, Inc. in fact registered with the C.A.B. as an air taxi operator engaged in air transportation, and in which the Respondent issued a policy of insurance in compliance with, and subject to, the Economic Regulations.

It is not difficult to understand why Air Carriers Express Services, Inc. came to the conclusion that it was an air taxi operator and that its operation was interstate in nature. This carrier used the means and instrumentalities of interstate commerce in the conduct of its operation. It not only advertised flights in a variety of national and international publications but it actually carried passengers for compensation or hire in interstate commerce. There was in fact a passenger on board the fatal flight who had flown into Georgia from out-of-state for the purpose of sport parachuting. The aircraft routinely operated between Peachtree-DeKalb Airport in Atlanta, Georgia and states throughout the United States for the purpose of sport parachuting. The policy of insurance was given pursuant to regulation for

the benefit of the public and should be interpreted subject to such regulations.

For the foregoing reasons, Petitioners respectfully request that this Court issue a Writ of Certiorari to review the decision of the Court of Appeals of Georgia to the extent it holds that an intrastate (local) flight conducted by a federally certificated air carrier within the scope of its certificate is not subject to the mandatory insurance requirements of Part 298 of the Federal Aviation Regulations.

This day of September, 1988.

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APPENDICES

APPENDIX A

SEPTEMBER TERM, 1987. (185 GA. APP.)

75040. HOWELL et al. *v.* UNITED STATES FIRE INSURANCE COMPANY.

75041. PRUITT et al. *v.* UNITED STATES FIRE INSURANCE COMPANY.

75042. WILSON et al. *v.* UNITED STATES FIRE INSURANCE COMPANY.

75043. YIN *v.* UNITED STATES FIRE INSURANCE COMPANY.

75044. BOLAND et al. *v.* UNITED STATES FIRE INSURANCE COMPANY.

75045. AIR CARRIERS EXPRESS SERVICES, INC. et al. *v.* UNITED STATES FIRE INSURANCE COMPANY.

(363 SE2d 560)

CARLEY, Judge.

On September 29, 1985, a Cessna 208 Caravan aircraft carrying a pilot and sixteen parachutists crashed shortly after take-off. All seventeen persons on board were killed. The aircraft was owned by appellant-defendant Air Carriers Express Services, Inc. (ACES). Appellee-plaintiff insurer had issued a policy which provided coverage to ACES for damage to the aircraft and for liability resulting from its operation. Appellee initiated this declaratory judgment action, naming as defendants appellant ACES and the appellant-administrators of the estates of Mr. Steven Wilson, the pilot of the aircraft, and of Mr. David Williams, the president of ACES. The remaining appellant-defendants sought and were granted permission by the trial court to intervene in the action as personal representatives of four of the parachutists killed in the crash.

In its petition, appellee sought, insofar as it is relevant to these appeals, a declaratory judgment to the effect that there existed no insurance coverage for the crash and that it had no duty to defend any civil action arising from the crash. Although

appellee's petition stated several grounds for its denial of coverage, it moved for partial summary judgment based only on the ground that the pilot, Mr. Wilson, did not meet the terms and conditions set forth in the "open pilot provision" of the policy declaration. Appellants in case nos. 75040, 75041, 75043, and 75044 filed their own cross-motions for summary judgment against appellee. The trial court granted appellee's summary judgment motion and denied the cross-motions for summary judgment against appellee. Appellants filed separate appeals from the order of the trial court granting summary judgment in favor of appellee. The resulting six cases are hereby consolidated for disposition in this single opinion.

1. Appellants first urge that, pursuant to certain provisions of federal aviation law, appellee has bound itself to provide coverage. However, the provisions of federal law upon which appellants rely apply only to interstate flights. If the possibility exists that air transportation services will cross state lines, then the air carrier must secure "liability protection for bodily injury and property damage *in the event of such interstate travel and to avoid [federal] sanctions.* . . . [The air carrier is required to be in] compliance with [federal] requirements for any air taxi service *where interstate operations may be involved.*" (Emphasis supplied.) *Coren v. Puritan Ins. Co.*, 184 Ga. App. 667, 669 (2) (1987). That the fatal crash in question was an intrastate flight is uncontroverted in the record. Therefore, the issue of the extent to which coverage would be afforded must be determined on the basis of the policy as interpreted by applicable Georgia law. See *Coren v. Puritan Ins. Co.*, supra at 669 (2).

2. Appellants contend that the appellee is bound by the pilot clause language which appears on the binder form issued to ACES rather than that which appears in the policy. "A binder is a contract of insurance in praesenti; temporary in its nature, intended to take the place of an ordinary policy until the same can be issued. It is a short method of issuing a temporary policy for the convenience of all parties, to continue, unless sooner canceled, until the execution of a formal policy . . . '[A binder is] . . .

itself a contract — temporary, sketchy, and informal, but a contract notwithstanding. [Cit.] Usually it fixes the term and coverage of the policy, but by express reference leaves the details of the contract to the latter. [Cits.] Hence *as to such details the contemplated policy rather than the binder is the determinative document.*' [Cit.]" (Emphasis supplied.) *Fort Valley Coca-Cola Co. v. Lumbermen's Mut. Cas. Co.*, 69 Ga. App. 120, 124 (24 SE2d 846) (1943). See also *Cincinnati Ins. Co. v. Stuart*, 139 Ga. App. 80, 81-82 (1) (227 SE2d 771) (1976).

Appellants urge, however, that the binder form was, in fact, itself a policy of insurance rather than a mere binder. In one place on the original form the following appears: "binder No. _____." However, the word "binder" had been stricken and the term "assigned policy" inserted in its place, so that the form read: "assigned policy No. _____." As the result of this alteration, appellants contend that the binder was itself a formal policy and that the pilot clause typed on the binder form was therefore a policy provision which could not be changed without the consent of the insured. See *Broome v. Mut. of Omaha Ins. Co.*, 119 Ga. App. 443, 446 (2) (167 SE2d 607) (1969).

However, the alteration did not purport to change the very nature of the document from a temporary binder to a formal insurance policy. On its face, the document is clearly shown to be a mere temporary binder rather than a formal insurance policy, and this is made manifest by its language, including among others, the following reference: "[u]nless *this binder* is replaced by the issuance of policy. . . . " (Emphasis supplied.) Since a formal insurance policy was issued before the crash of the aircraft, it is the language of the pilot clause in that formal policy which controls. Compare *International Indem. Co. v. McKeever*, 174 Ga. App. 871 (331 SE2d 909) (1985) (holding that where the incident giving rise to the claim occurs before the policy is issued the language of the binder controls). Accordingly, whether or not the language of the pilot clause in the binder was ambiguous or in conflict with the language of the policy are issues which need not be addressed.

3. On the date of the crash, the pilot clause of the policy declaration stated as follows: "PILOT CLAUSE: Only the following pilot or pilots holding valid and effective pilot and medical certificates with ratings as required by the Federal Aviation Administration for the flight involved will operate the aircraft in flight: 1. Pilots who must have a commercial or airline transport certificate with an instrument rating and a minimum of 2000 logged pilot hours of which 250 hours have been in turbine aircraft and are graduates of the ground and flight training school conducted by the manufacturer or an entity under contract to it for the [Cessna 208 Caravan] aircraft . . . otherwise Tom Beaudrot. 2. A two person crew consisting of: A. *Pilot in command:* [same as 1 above]. B. *Co Pilot:* David Williams."

"A provision in the policy that the aircraft should be piloted only by the named insureds or a qualified private or commercial pilot with a minimum of 200 logged hours as a pilot in command of aircraft, 10 hours of which must have been in a Cessna 172 or aircraft of similar type, and who has a valid and effective pilot certificate with proper rating as required by the Federal Aviation Agency for the flight involved, is a valid and binding one." *Grigsby v. Houston Fire &c. Ins. Co.*, 113 Ga. App. 572, 573 (2) (148 SE2d 925) (1966). See also *Ranger Ins. Co. v. Columbus-Muscogee Aviation*, 130 Ga. App. 742, 745 (4) (204 SE2d 474) (1974) (holding that where the pilot of the plane at the time of the crash did not possess a valid medical certificate as required by the "Pilot's Clause" summary judgment for the insurer was mandatory); see also *Atlanta Air Fleet v. Ins. Co. of N. America*, 130 Ga. App. 15 (202 SE2d 192) (1973) (upholding the validity of a "Pilot's Clause" requirement that the pilot in command be properly certificated and rated for the particular aircraft). In the instant case, the policy requirement that pilots must be graduates of the manufacturer's ground and flight training school is valid. Such a provision, like those previously held to be valid, "had an obvious relation to the degree of risk or hazard assumed by the insurer...." *Atlanta Air Fleet v. Ins. Co. of N. America*, supra at 16.

Appellants urge that this requirement is void because no manufacturer's flight school existed from which a pilot could graduate and, therefore, the requirement could not be met. However, the record shows that the manufacturer did operate a pilot-training program under the name "Caravan I Flight Crew Training," which program was designed to provide training for the type of aircraft in question. It is also clear from the record that "Caravan I Flight Crew Training" was the *only* ground or flight training for the particular make and model of aircraft that was offered by the manufacturer, and that there was no other entity under contract to the manufacturer to provide such training. Accordingly, it is clear that "Caravan I Flight Crew Training" was *"the* ground and flight training school conducted by the manufacturer or an entity under contract to it for the [Cessna 208 Caravan] aircraft" referred to in the policy declarations. (Emphasis supplied.) At least two of the pilots employed by ACES were graduates of the "Caravan I Flight Crew Training" course. However, Mr. Steve Wilson, the pilot of the aircraft at the time of the crash, had not attended that training program and was not a graduate thereof. That actual flight training may not have been a mandatory part of the curriculum of the "Caravan I Flight Crew Training" does not obviate the fact that it was *the* manufacturer's ground and flight training school for the particular aircraft. The pilot clause of the policy requires graduation from *the* manufacturer's ground and flight training school, and it does not expressly require that there be a specified amount of either ground training or flight training. Rather, the pilot clause leaves the requirements for graduation or certification to the manufacturer of the aircraft.

The fact that there were employees of ACES who were graduates of the manufacturer's only flight crew training program for the make and model aircraft involved in the crash negates appellants' argument that the pilot training requirement of the pilot clause of the policy was void because it could not be satisfied. Accordingly, the trial court did not err in granting summary judgment in favor of appellee in that it was established that, in violation of the pilot clause of the policy, the pilot at the time of

the crash was not a graduate of the manufacturer's ground and flight training school.

4. Appellants in case nos. 75040, 75041, 75043, and 75044 enumerate as error the denial of their cross-motions for summary judgment. However, in light of our holding in Division 3 that the trial court did not err in granting summary judgment in favor of appellee, it follows that the trial court did not err in denying these appellants' cross-motions for summary judgment.

These appellants also enumerate as error the trial court's denial of their motions to compel discovery of the investigatory file prepared by Aviation Office of America (AOA) following the crash. The trial court made specific findings that AOA was the agent of appellee, and that AOA's investigatory file was prepared in anticipation of this litigation. The trial court's order also recites ample evidence to support its finding that the requested material comes within the ambit of OCGA § 9-11-26 (b) (3), and the trial court correctly held that discovery of such material could not be had in the absence of a showing of substantial need and undue hardship. See *Tobacco Rd. v. Callaghan*, 174 Ga. App. 539 (330 SE2d 768) (1985); *Warmack v. Mini-Skools*, 164 Ga. App. 737, 738-740 (2) (297 SE2d 365) (1982); *Georgia Intl. Life Ins. Co. v. Boney*, 139 Ga. App. 575, 580-582 (3) (228 SE2d 731) (1976). The trial court's finding that appellants had "not made such an affirmative showing of need" is not clearly erroneous, and therefore, the denial of the motion to compel discovery was not error.

Judgments affirmed. Banke, P. J., and Benham, J., concur.

DECIDED NOVEMBER 2, 1987 —

REHEARING DENIED DECEMBER 2, 1987 — CERT. APPLIED FOR.

Action on policy. Fulton Superior Court. Before Judge Langham.

John A. Howard, for appellants (case no. 75040).

William C. Lanham, Clark H. McGehee, for appellants (case no. 75041).

Gregory T. Presmanes, James G. Jackson, for appellants (case no. 75042).

Nicholas C. Moraitakis, for appellant (case no. 75043).

S. Phillip Brown, for appellants (case no. 75044).

John W. Henderson, Jr., H. Brian Sams, for appellants (case no. 75045).

Sewell K. Loggins, John J. Wiles, for appellee.

APPENDIX B

IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

UNITED STATES FIRE INSURANCE COMPANY,	)	
Plaintiff,	)	
v.	)	CIVIL ACTION
AIR CARRIERS EXPRESS SERVICES, INC., JOHN WALTON HENDERSON, Administrator of the Estate of David L. Williams and LOUIS LEVENSON, Temporary Administrator of the Estate of Steve Herbert Wilson, et al.,	)	FILE NO. D-27263
Defendants.	)	

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This matter is presently before the Court on cross motions for summary judgment of the plaintiff and of the defendant, Estate of Rodney L. Howell.

The issues have been briefed and argued to the Court. After a thorough consideration of the briefs, arguments and the entire record (except for the affidavit of W. R. Scott which was not considered), the Court enters this order.

The Motion for Summary Judgment of defendant Estate of Rodney L. Howell is denied.

The Motion for Summary Judgment of plaintiffs is granted.

It is hereby ORDERED and adjudged that United States Fire Insurance Company has no coverage under policy number 700AC-32-US-57005 for the accident of September 29, 1985 as to any of the defendants: and that United States Fire Insurance Company has no duty to defend any civil actions arising out said accident or to pay any judgment which might be rendered against defendants or any of them; and that United States Fire Insurance Company has no duty to pay defendant Air Carriers Express Services, Inc. or John Walton Henderson, Administrator of the Estate of David L. Williams for any sums alleged to be due for damage to the aircraft in question as a result of the accident of September 29, 1985.

SO ORDERED, this 28th day of January, 1987.

/s/ Don A. Langham

DON A. LANGHAM, Judge
Superior Court of Fulton County

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APPENDIX C

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

ATLANTA: January 21, 1988

Dear Sir:

Case No. 45318. ROBERT E. HOWELL, ET AL. v. UNITED STATES FIRE INSURANCE COMPANY, ET AL.; Case No. 45319. HERBERT WILSON, ET AL. v. UNITED STATES FIRE INSURANCE COMPANY, ET AL.; Case No. 45320. AIR CARRIERS EXPRESS SERVICES, INC. v. UNITED STATES FIRE INSURANCE COMPANY

The Supreme Court today granted the writ of certiorari in this case. All the Justices concur, except Marshall, C. J. and Bell, J., who dissent.

THIS CASE WILL BE ASSIGNED TO THE MARCH 1988, ORAL ARGUMENT CALENDAR.

The Court is particularly concerned with the following:

Is there a conflict between this case and *Coren v. Puritan Ins. Co.*, 184 Ga. App. 667, cert. den. (1987)? If so, how should the conflict be resolved and how does the resolution affect the insurance in this case?

Briefs filed in the Court of Appeals are included in the record presented to this court. Additional briefs are not required but may be submitted.

Very truly yours,
JOLINE B. WILLIAMS, *Clerk*

APPENDIX D

In the Supreme Court of Georgia

Decided: May 4, 1988

45318. HOWELL *v.* UNITED STATES FIRE INSURANCE CO.
45319. WILSON *v.* UNITED STATES FIRE INSURANCE CO.
45320. AIR CARRIERS EXPRESS SERVICES, INC. *v.* UNITED STATES FIRE INSURANCE CO.

PER CURIAM.

After plenary consideration of this matter (*Howell v. U.S. Fire Ins. Co.*, 185 Ga. App. 154 (1987)), it is found not to satisfy the criteria for the grant of certiorari, and the writ is therefore vacated.

All the Justices concur.

APPENDIX E

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

ATLANTA: June 22, 1988

The motion for a rehearing was denied today: Case No. 45318, 45319, 45320, Howell, Wilson, Air Carriers Express Services, Inc. v. United States Fire Ins. Co. et al.

Yours very truly,
JOLINE B. WILLIAMS, *Clerk*

APPENDIX F

Part 298 **Title 14—Aeronautics and Space**

Chapter II—Civil Aeronautics Board

• • •

§ 298.1 Applicability of part.

This part establishes a classification of air carriers known as "air taxi operators," provides certain exemptions to them from some of the economic regulatory provisions of Title IV of the Federal Aviation Act and specifies procedures by which such air carriers may obtain authority to conduct operations, and establishes rules applicable to their operations in air transportation in all States, Territories and possessions of the United States. [1]

• • •

§ 298.2 Definitions.

• • •

(b) "Air taxi operator" means an air carrier coming within the classification of "air taxi operators" established by § 298.3.

(c) "Air Transportation" means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft as defined by the Act.

• • •

§ 298.3 Classification.

(a) There is hereby established a classification of air carriers, designated as "air taxi operators," which directly engage in the air transportation of persons or property or mail or in any combination of such transportation and which:

• • •

---

[1] Footnote Omitted

§ 298.21 Filing for registration by air taxi operators.

(a) Every air taxi operator (whether or not he is also a commuter air carrier as defined in this part) who plans to commence operations under this part shall register with the Board not later than 30 days prior to the commencement of such operations, unless, upon a showing of good cause satisfactory to the Director of the Bureau of Pricing and Domestic Aviation, registration within a lesser period of time is allowed.

• • •

§ 298.37 Prohibition of services not covered by insurance.

An air taxi operator shall not operate in air transportation or provide or offer to provide air transportation unless there is in effect liability insurance which covers such transportation and which is evidenced by a current certificate of insurance on file with the Board as required by Subpart E.

• • •

§ 298.41 Basic requirements.

(a) Each air taxi operator engaging in air transportation shall maintain in effect liability insurance coverage which complies with the requirements of this subpart and which is evidenced by a currently effective policy of insurance, with an attached standard endorsement, available for inspection by the Board and the public at its principal place of business. Evidence of such insurance coverage, in the form of a certificate of insurance, shall be maintained on file at the Board at all times.

• • •

CERTIFICATE OF SERVICE

I, Warren Candler Fortson, hereby certify that I have a served three true and correct copies of this Petition for Writ of Certiorari, by hand, before the time of filing with the Clerk of this Court upon:

Sewell K. Loggins
Mozley, Finlayson & Loggins
1800 Coastal States Building
260 Peachtree Street, N.W.
Atlanta, Georgia 30303

I further certify that all parties required to be served have been served.

This _____ day of September, 1988.

WARREN CANDLER FORTSON

Supreme Court, U.S.
FILED
OCT 17 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-482

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ROBERT E. HOWELL, BETTY CHAVEZ AND ERNEST SCHUMACHER, AS ADMINISTRATOR OF THE ESTATE OF RODNEY L. HOWELL,

DR. AND MRS. J. CRAYTON PRUITT, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF MARK H. PRUITT,

CORINA K. YIN, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF PAUL C. YIN,

CHARLES BOLAND, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF ANN RENEE BOLAND AND CYNTHIA BOLAND,

Petitioners,

v.

UNITED STATES FIRE INSURANCE COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE GEORGIA COURT OF APPEALS

BRIEF OF RESPONDENT UNITED STATES FIRE INSURANCE COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Respondent United States Fire Insurance Company ("U.S. Fire")[1] respectfully submits this Brief in opposition to the Petition for Writ of Certiorari and for the reasons stated herein urges this

[1] U.S. Fire is a wholly owned subsidiary of Crum & Forster, Inc., which is a wholly owned subsidiary of Xerox Corporation.

Honorable Court to deny the Petition.

STATEMENT OF THE CASE

Petitioners have not supplied the Court with a full and correct statement of the case. U.S. Fire is therefore setting forth below its own statement of the case.

This litigation arises from the September 29, 1985 crash of a Cessna Caravan aircraft piloted by Steven Herbert Wilson ("Wilson"). [Second Supplemental Record, affidavit of Patricia Valley Ratermann, page 17, lines 21-23; R.402]. Respondent U.S. Fire had issued a policy of aircraft insurance to Air Carrier Express Services, Inc. covering the Cessna Caravan for certain specified risks, a copy of which policy is contained in the Record at pages 72-91. Following investigation, Respondent instituted this declaratory judgment action contending there was no coverage for the accident on the separate and independent grounds of fraudulent misrepresentations by the insured in applying for the insurance; submission of a fraudulent claim by the insured for an incident prior to the accident in question; fraudulent representations by the insured that the aircraft was not being used for parachuting; operation of the aircraft at the time of the accident by a pilot who did not meet the policy requirements; invalidity of the aircraft airworthiness certificate at the time of the accident; and exclusion of coverage for death of the named insured or a crew member. (R. 13-14.)

Only one of the grounds for lack of coverage was raised in a Motion for Summary Judgment in the trial court, namely, that pilot Wilson had not attended a Cessna approved flight and ground training course for the Cessna Caravan aircraft. (R.95.) The policy in question required that any pilot operating the aircraft be "a graduate of a ground and flight training school conducted by the manufacturer of the aircraft" (R.91) and excluded coverage when the aircraft was operated by a pilot not meeting such policy requirements. (R.73.) Because the undisputed facts demonstrated that the pilot had not attended

a Cessna approved flight and ground training course for the Cessna Caravan aircraft, the trial court correctly held that there was no coverage for any claims arising from the accident. (R.687.) That judgment was affirmed by the Georgia Court of Appeals. *Howell v. United States Fire Insurance Co.*, 185 Ga. App. 154, 363 S.E.2d 560 (1987). Although the Georgia Supreme Court initially granted certiorari to review the Georgia Court of Appeals' decision, the grant of certiorari was later withdrawn by the Georgia Supreme Court [(258 Ga. 338, _____ S.E.2d _____ (1988)], so that the Court of Appeals' decision became final.

Although Petitioners imply that at the time of the accident Air Carrier Express Services was operating the aircraft pursuant to its interstate air taxi registration, it is undisputed that such was *not* the case. The undisputed evidence shows that the flight in question originated at the Jenkinsburg, Georgia airport for the purpose of dropping parachute jumpers back onto that same airport. [Second Supplemental Record, Deposition of Patricia Valley Rattermann, p. 11, 1. 1-17]. It was therefore specifically exempted from the Air Taxi Regulations. See, 14 C.F.R. §135.1. The accident occurred during the takeoff from the airport and the entire intended flight path was totally within the State of Georgia. It is undisputed that the flight was therefore a totally intrastate operation.

Further, although a reading of Petitioners' Brief would suggest that the passengers on the parachute jump flight were carried as part of an interstate operation, such conclusion is *not* supported in the Record. Although Petitioners make the loose allegation that one passenger on board came from out of state with the intention of making the parachute jump, there is no evidence that he was transported from out of state by Air Carrier Express Services itself, or as part of an arrangement between Air Carrier Express Services and some other carrier. The fact is, he was simply a person from out of state, whose transportation to the jump site had no involvement with Air Carrier Express

Services. There is absolutely no evidence that Air Carrier Express Services at any time carried fare-paying passengers in interstate commerce for parachute jumping. The fact that in the past the aircraft may have been in different states where it dropped jumpers on local flights does not subject the accident flight to Air Taxi Regulations, as suggested by Petitioners. Simply put, the record does not contain any facts to support Petitioners' "interstate activity" claim.

Petitioners also did not disclose how any alleged "federal question" was supposedly injected into the litigation. As noted above, there is no coverage under the insurance policy in question because the pilot of the aircraft on the accident flight did not meet the policy requirements. That fact is undisputed. To avoid the consequences of the failure to meet policy requirements, Petitioners attempted to create a coverage issue based on the Economic Regulations contained in 14 C.F.R. §298.1. Petitioners have attempted to argue that the insurance policy itself was required to be submitted to the Department of Transportation and that no changes could be made in it without notice to the Department of Transportation. Alternatively, Petitioners have tried to argue that the exclusion in question was not permitted under the Economic Regulations. The Georgia courts found it unnecessary even to deal with Petitioners' invalid arguments, as the Economic Regulations were simply inapplicable to the purely local flight.[2]

The Georgia courts which have considered this Georgia

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[2] Even if the Court had reached such arguments, the exclusion is specifically authorized by the Regulations. 14 C.F.R. §298.44 (h) (2). Further, there was no requirement that the policy be submitted to the Department of Transportation at any time. The only information given to the Department is that contained in CAB Form 257, which is a part of the record. R.395. 14 C.F.R. §298.41(a). Therefore, even if Petitioners' invalid arguments regarding applicability of the Economic Regulations were reached, the outcome would remain the same.

insurance contract correctly held that the Ecomonic Regulations contained in 14 C.F.R. §298 were not applicable. Those decisions, in accord with every decision from federal and state appellate courts on the question, were clearly correct.

REASONS FOR DENYING THE PETITION

The Decision Below Does Not Conflict With Any Other State Or Federal Decisions And Under Supreme Court Rule 17 There Are No Special Or Important Reasons For Granting Review.

This case meets none of the criteria set forth in Rule 17 of the Rules of this Honorable Court. The decision of the Georgia Court of Appeals is directly supported by decisions from other state courts of last resort and by decisions from the Federal Court of Appeals. The decision does not conflict with any decisions from this Court and is completely in accord with applicable federal aviation statutes and regulations.

As noted above, the Georgia Court of Appeals held that because the flight in question was purely an intrastate operation, the provisions of Part 298 of the Federal Air Regulations were inapplicable. That ruling is in accord with the decision of *every* appellate court that has considered the question and is directly mandated by the express terms of the regulations and the statute upon which they are based.

The Economic Regulations contained in 14 C.F.R. §298.1 (Part 298) are applicable only to one who is an "air carrier engaging in 'air transportation' as that term is defined under the [Federal Aviation] Act [of 1958, as amended]." "Air Transportation" is defined in the Act and in the Regulation itself as *"interstate,* overseas, and foreign air transportation." 49 U.S.C. §1301(10); 14 C.F.R. 298.2(c) [emphasis supplied]. Further, interstate, foreign and overseas air commerce are defined as "carriage by aircraft of persons or property for compensation or hire. . . in commerce between respectively — (a) a place in any State of the United

States or the District of Columbia, and a place in any other State of the United States or the District of Columbia . . ." 49 U.S.C. §1301(20). The insured, Air Carrier Express Services, Inc., was not an air carrier engaged in air transportation as defined by the Act during the flight in which the accident occurred, as the flight was wholly within the State of Georgia, and the entire intended flight path was wholly within Georgia. The Economic Regulations clearly were therefore *not* applicable to the accident flight, and the Georgia Court of Appeals correctly so held.

Dower v. United Airlines, Inc., 329 F2d 684 (9th Cir. 1964), is the only applicable federal appellate decision on point. There, the Ninth Circuit held that the Economic Regulations[3] do not apply to *intrastate* flights. As the Court noted:

> "Air transportation is defined in §101(10) of the Act, 49 U.S.C. §1301(10), to mean (as relevant here) 'interstate air transportation.'
>
> " 'Interstate air transportation' in turn is defined by §101(21), 49 U.S.C. §1301(21) to mean, in the context of this case, 'the carriage by aircraft of persons or property as a common carrier for compensation or hire. . . in commerce between (a) a place in any State of the United States or the District of Columbia, and a place in any other State of the United States or the District of Columbia; or between places in the same State of the United States through the airspace over any place outside thereof. . .'
>
> "The District Court ruled that a flight from San Francisco to Los Angeles did not fall within this definition. We agree." 329 F.2d 685.

The Ninth Circuit thus found that a particular local flight solely within the State of California by an air carrier, United

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[3] 14 C.F.R. §298 is a subsection of the Economic Regulations.

Airlines, Inc., which was otherwise generally involved in interstate air transportation, was not "interstate air transportation" under the Act and, thus, the Economic Regulations (in that case, 49 U.S.C. §1371)[4] did not apply. That is clearly the situation in the case at bar, as the Georgia Court of Appeals correctly ruled.

All state appellate courts which have considered the question are in agreement with the Georgia Court of Appeals on this issue.

As the Georgia Court of Appeals noted, a different division of the same court had stated that the requirements for insurance contained in the Economic Regulations were for "protection for bodily injury and property damage in the event of . . . interstate travel and to avoid CAB sanctions . . ." *Coren v. Puritan Insurance Co.*, 184 Ga. App. 667, 669, 362 S.E.2d 380 (1987) (emphasis supplied). In *Coren*, the Georgia Court of Appeals held that the endorsement added to the insurance policy to comply with Civil Aeronautics Board Regulations was nevertheless applicable to change the overall policy even though the flight in question was a local intrastate joy ride. Contrary to Petitioners' contention, *Coren* did not hold that the Regulations themselves were applicable to the local flight in question there.

In *Forum Insurance Co. v. Seitz Aviation, Inc.*, 241 Kan. 334, 737 P.2d 29 (1987), the Kansas Supreme Court held that Part 298 of the Economic Regulations applies only to interstate transportation and that the particular flight in question must be examined to determine whether it was interstate or intrastate in character.

In *Bonner v. United States Fire Insurance Co.*, 494 S.2d 1311 (La. App. 1986), the contention was made that the CAB Standard Endorsement, which was part of the policy pursuant to the

---

[4] 49 U.S.C. §1371 is the statutory authority upon which all of the Economic Regulations, including Part 298, are based.

provisions of Part 298 of the Economic Regulations, created coverage. The flight in question originated in Louisiana with Texas as its destination and was therefore an interstate flight. However, the Court noted that the aircraft was not being used as an "air taxi," i.e. in transportation for hire, at the time of the flight and therefore the CAB standard endorsement was simply not applicable.

Bonner, Forum, and *Dower* demonstrate that the particular flight in question must be examined to determine whether the Economic Regulations are applicable. If it is not an interstate flight, carrying passengers or property for hire, then the regulations are simply not applicable, despite the fact that the operator holds authority to operate for hire with appropriate endorsements on his liability insurance coverage. Here the flight was wholly intrastate and therefore the Economic Regulations are not applicable.

Petitioners argue that *Braniff Airways,* 40 CAB 887 (1964), holds that a purely intrastate flight is subject to the Economic Regulations. A reading of that case shows such not to be true. Specifically, although Braniff contended that the proposed transportation was to be solely intrastate, the Board found otherwise. It stated, "the nearest approach to a true destination for passengers on such tours is the tour itinerary as a whole. On this basis *it is concluded that the nature of the movement is interstate transportation from various points in the United States to points within the State of Texas, including that portion of the tour operated by Braniff.*" 40 CAB 887. (Emphasis supplied.) Such is not the case here. Although petitioners make the loose allegation that one passenger on board came from out of state with the intention of making a parachute jump, there is no evidence that he was transported from out of state by Air Carrier Express Services itself or as part of an arrangement between Air Carrier Express Services and some other carrier. The fact is he was simply a person from out of state whose transportation to

the jump site had no involvement with Air Carrier Express Services, unlike the involvement of Braniff as described in the CAB opinion, *supra.*

This case in no way involves significant federal questions. Rather, it involves state law issues concerning interpretation of a contract of insurance issued in the State of Georgia to a Georgia insured and involving a purely intrastate flight.

CONCLUSION

The fundamental issue in this case is one of state law involving coverage of an insurance contract issued within the State of Georgia. Petitioners have attempted to raise a false issue of the applicability of the Federal Aviation Economic Regulations, but such alleged issue was correctly issued within the State of Georgia. Petitioners have attempted to raise a false issue of the applicability of the Federal Aviation Economic Regulations, but such alleged issue was correctly decided by the Georgia Court of Appeals in accordance with the clear provisions of the Federal Aviation Act and the Regulations issued thereunder, and in accordance with the decisions of all other appellate courts, federal and state, which have considered the question. There are no special or important matters or significant federal questions involved in this case, and the "review criteria" set forth in Supreme Court Rule 17 are not satisfied here.

Respondent respectfully prays that the Petition for Writ of Certiorari not be granted.

Respectfully submitted,

Sewell K Loggins

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CERTIFICATE OF SERVICE

I, Sewell K. Loggins, a member of the Bar of this Court, hereby certify that I have served three true and correct copies of this Brief In Opposition To The Writ Of Certiorari, by hand, before the time of filing with the Clerk of this Court, upon:

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I further certify that all parties required to be served have been served.

This 17 day of October, 1988.

Sewell K Loggins

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